SOME OBSERVATIONS UPON THE REPORT OF THE COMMITTEE OF THE PHI DELTA PHI WITH SPECIAL REFERENCE TO THE TYPICAL JUDICIARY ARTICLE FOR A CONSTITUTION

By Charles A. Boston,

Chairman of the Committee of Professional Ethics of the New York County Lawyers' Association, New York City.

The Committee has extended to me the esteemed privilege of making some discursive observations upon its recommendations, especially with reference to its proposed constitutional article.

The Lawyer's Attitude toward the Conventions of His Profession

The New Republic, in commenting recently upon a distinguished lawyer, said: "Nor did Mr. ——— have that kind of intellectual curiosity which gives a lawyer a critical attitude toward the conventions of his profession." The truth is that this is almost a universal failing of the legal profession: the conventions of the profession too often permit and promote an attitude of tolerance for iniquities under the guise of law, which enthral the community and defeat the litigant unjustly.

Another truth is that in many of its features the law as administered defeats the achievement of just results, through its unnecessary formalism and its unnecessary adherence to ancient and outworn conventions, the most of them the result in one shape or another, of ancient methods of thought among lawyers,—lawyers elevated to judicial position, or lawyers acting as or for legislators. In these aspects this law is an inadequate instrument, not adapted to the needs of a modern civilized community with progressive aspirations. Laymen cannot be expected to remodel law, but they justly criticize many of its features; and they justly censure the legal profession for not using its knowledge and its influence to remodel laws to accomplish just results in operation. It may not be the *duty* of the legal profession as such to conceive the iniquity of

law or to work for its improvement; but it is its *opportunity* to do so, and on the other hand, it can lend its influence to perpetuate unjust methods or unjust institutions in the administration of public justice through the courts.

My observation leads me to the belief that existing laws fail to accomplish just results through the survival and enforcement in the courts of formal laws or formal rules without due regard to the purpose for which they were devised, or through the survival and enforcement of laws not adapted to present-day views of justice.

By way of general indictment but without specifications, I should say that those elements of law which contribute most largely to produce unjust or discouraging results are: a technical and elaborate practice, technically pursued; an antiquated and unreasonable system of evidence which is so administered as often to exclude the very best attainable evidence of a fact, which is accepted as such evidence everywhere outside of a court room by reasonable men; and a tenacious and idolatrous adherence to a civil jury as an agency in determining litigated matters.

Lawyers cling to these institutions fanatically in the most cases without even an inquiry in their own minds as to whether the machine of which they are a part performs well the civic duty that is its sole justification for being.

THE AWAKENING OF BODIES OF LAWYERS

It is most pleasing, therefore, to note that at present throughout the country lawyers, in various associated forms, are appreciating the justice of popular dissatisfaction and are themselves applying their experience and their intelligence to meeting a real public need.

WHAT IS WRONG WITH LAW AND LAWYERS?

In endeavoring to formulate in my own mind the relations in which existing law as administered seems to me to fall short, I have thought that the failings and their remedies in law reform could be effectually discussed in the four categories: law and injustice, law and trickery, law and absurdity, the game of evidence. Wherever the application of law systematically produces injustice, or promotes trickery in its administration, or perpetuates inherent absurdity, and wherever the admissibility of evidence becomes itself a game apart from the conscientious endeavor to ascertain the truth of a

dispute and its actual merits within the law, there the institution of judicial machinery fails of its rational purpose.

There is a widespread sense of soreness at the administration of justice in the courts. It behooves those who are conscious of the fact to try to eradicate the cause and either to disabuse the public mind if it is in error, or to rectify the evil if it actually exists.

The report of the committee directs attention to the quotation from *The Man in Court* that "During the trial a feeling of resentment of court procedure grows." This feeling is the natural repugnance to a machine, which, inaugurated for reaching just results, proceeds by a method which, to the popular mind, appears to make such results impossible. It is this natural resentment which contains the seeds of reform and it should not be laughed to scorn, for it arises out of human *habits* of thought and is based upon a justifiable impatience with seeming injustice.

It is by no means true that "Whatever is, is right." The history of judicial administration, like the history of all other human institutions, is a history of abuses. And as I, from reflection, have tried to place into categories the recognizable shortcomings of law and its administration, I have felt that a good beginning is made, when it is pointed out that, occasionally at least, law deliberately permits injustice, deliberately promotes trickery, is deliberately absurd, and deliberately shuts the door to the ascertainment of truth. When one discovers this fact, he naturally asks the question: Is this a necessary adjunct of law, or is it merely the result of indifference, or ignorance, or selfishness? In a measure it is the combined result of all three.

To discuss each of these categories of shortcoming and to point out specific instances would swell these observations beyond their essential limit; but with them in mind, I shall approach the specific questions to which I am now limited.

THE ACTIVITY OF CERTAIN BAR ASSOCIATIONS

It may not be inopportune, however, to point out that the San Francisco Bar Association has instituted a committee styled the General Welfare Jurisprudence Committee, whose powers are defined in the resolution for its institution, and are as follows:

to consider the matter of the local bar associations providing practical means for the coördinate consideration by laymen and members of the legal profession of the

problems involved in the enactment, administration and enforcement of the law, and also in striving for a better understanding of and obedience to and betterment of the law as an instrumentality for justice and the welfare of all, and to report from time to time as such committee may see fit either to this association or to other organizations and to seek the aid and coöperation of other organizations in such work of the committee and all matters incidental thereto.

It were well, it seems to me, if every bar association in the country had such a committee, charged with the duty of assimilating the law and its administration to the real needs of the people with a view to limiting injustice, eliminating the trickery of practice, pruning out the unnecessary absurdities of an inherited law, and so remodeling the accepted law of evidence as to admit of a wider search for truth.

The American Bar Association, through its special committee on coöperation between bar associations, of which I am a member, has already planned that one of the topics for discussion at the conference of delegates from state and local bar associations at Saratoga Springs on the first Monday of September, shall be, "The Elimination of Anachronisms in Law."

ANACHRONISMS IN LAW

Such anachronisms are illustrated by the importance given to a scroll or other form of seal, as essential to the validity of a deed, or of a bill of exceptions, or as conclusively or otherwise importing a consideration, or as extending the period of limitations, or as shifting the burden of proof.

These concepts do not enter into the daily habits of the community in its transactions and they are, therefore, merely legal pitfalls for the unwary. Another such pitfall is the necessity of fixed formulae such as "heirs and assigns" as essential to produce specific results. It is wholly unnecessary for present purposes to elaborate the illustrations. The bar found these concepts as inheritances; it was educated in their sanctity. These or similar notions are a part of the essential preparation of lawyers, and the vast majority of them are willing to accept them as unchanging features of an established order, received from antiquity to be transmitted to posterity, regardless of the fact that they are or should be non-essentials, and that their perpetuation frequently promotes injustice by giving an undue advantage to the crafty and designing.

Similar non-essentials everywhere unduly clutter the existence of just law, and the just administration of law. When we scan the present situation we find that the promotion of just results through the administration of law in litigation, demands a scrutiny and a challenge of laws, both substantive and procedural.

PROCEDURAL REFORM

In this present article the procedural is first to engage our attention, and in particular the recommendations of this one committee of the Phi Delta Phi fraternity.

I desire at the outset to emphasize my own view that the reformation of procedure is but one aspect of the opportunity which lies before the lawyer. It is an unfortunate fact that the education of the lawyer makes against his participation in legal reform. His education is a process of initiation into the mysteries of the law as it is; he is introduced into an existing system, and for admission to its practice, he must know it as it is, and not as it ought to be. There is therefore no incentive, save intelligent citizenship, superior to the mysticism of professional order, which prompts him to any active participation in legal reform.

The public benefit, which can be conferred through the activity of initiation manifested in such bodies of lawyers as this committee of the Phi Delta Phi, is inestimable. It is such activity which overcomes the inertia of professional satisfaction in that great mass of the profession, which, being of necessity condemned to earn its livelihood through the law, is eminently content to see the law administered as it is, and not as it should be, and is content to trim its sails to meet the winds of an established order, without questioning whether in righteousness they ought not to blow otherwise.

The report itself adequately argues the advantages of ideals. Let me point out, however, that ideals have two bases: ideals of results, and ideals of methods. The ideal of results should be the primary ideal, and it necessitates a scrutiny of substantive as well as remedial law, and of all procedural law as well as the law of judicial organization.

To my mind, the essential ideal of procedural law is that it should be so framed as to assure to litigants the disposition of their controversies with proper regard to their actual right, after an adequate opportunity to be heard upon the merits; and specific methods

conserving these results should be framed from the public and not from the private standpoint. So considered, no litigant should have a vested right in a method; and consequently appeals for errors of practice should be unknown unless the alleged error can be reasonably certified by counsel to have deprived the litigant of substantial rights without due process of law. In other words, errors of practice should be measured, not by the inquiry whether some standard of procedure was or was not observed, in interlocutory matters, but whether such procedure deprived a litigant of a fair opportunity to present the merits of his cause or defense.

The fault of all statutory procedure seems to me to be that the courts in administering it seem to regard it as conferring rights upon parties, whereas it should be regarded as the definition of a rule of convenience.

The report deals specifically with matters in New York State, and my discussion and observations will have that fact in mind. Under a statute of New York, in the Marine Court (now City Court of the city of New York) a statutory form of summons required an appearance and answer in ten days after service in certain cases. This is a rule of convenience; it is reasonable that it should be uniform. But what reasonable justification is there for the judicial concept that a summons requiring an answer in a different number of days is void judicial process? Yet it took a judgment of the Court of Appeals reversing the general term of the Court of Common Pleas (itself an Appellate Court) to determine that such a summons was not a nullity.[1]

It is the fact of intellectual slavery in judicial mentality under a detailed statutory procedure which demands that such procedure must be liberal and the merest skeleton. It may well be that the judiciary would adopt as a measure of convenience every existing rule of the present Code of Civil Procedure, with its thousands of sections, but judicially adopted they should be what they always ought in the main to be—merely rules for expedition and order, instead, as now, of being the inflexible rules of a complicated game in which the remedy is the thing played for. Too frequently, the merit is utterly lost to view. Of what earthly moment, except to suit convenience, is the question whether in a given case, a notice of trial is given or an order to show cause is returnable at the opening

[1] *Gribbon* v. *Freel*, 93 N. Y. 93.

day of a term or later. Yet I have myself been of necessity engaged in serious and substantial litigation before an appellate division in which that question was further complicated by the fact that the appointed day for opening fell upon a public holiday and the court was not actually there in session.[2]

The variety of ways in which such questions actually arise in practice from a statutory procedure which the courts deem themselves under the obligation of law to observe, passes imagination of man to number. Such being the case, what is a man who has his eyes upon the merits of the dispute and the great public convenience to do? He should, in the interest of public and litigant alike, agitate for a practice framed upon the theory of convenience and flexibility, instead of upon the theory of a vested right in a method of procedure, conferred by law upon every litigant. Rules of parliamentary law, so-called, are accepted by deliberative bodies, for convenience and order, but what person would seriously advocate the proposition that the actual vote of a deliberative assembly could be invalidated by some mere breach of parliamentary procedure in reaching a vote?

Yet this is practically the nature of almost every controversy today in New York upon appeals from interlocutory orders, which are permitted and taken by the thousand. And it seems to the average New York lawyer to be of the very essence of liberty itself that at least one appeal should be allowed from every interlocutory order, whereas in the federal jurisdiction such appeals are wholly unknown unless they involve an application for an injunction.

Let us consider the public purse for an instant. Appeals from interlocutory orders always represent a large percentage of the appeals to the appellate division in New York City.[3] Think of the vast aggregate of costs, counsel fees, printing expenses, and expenses of the judicial establishment, which could be avoided if the state practice were assimilated to the federal practice. The federal practice is, so far as I know, completely satisfactory in this respect, yet the average New York lawyer is terrorized at the mere mention

[2] For illustrations of similar litigation over mere mistakes of practice in which, however, the courts gave a liberal interpretation of the law, see *Bander* v. *Covill*, 4 Cowen (N. Y.) 60, *Jackson* v. *Brownson*, 4 Cowen (N. Y.) 51, *N. Y. Central Ins. Co.* v. *Kelsey*, 13 How. Pr. (N. Y.) 535, *Douw* v. *Rice*, 11 Wendell (N. Y.) 180, *McCoun* v. *N. Y. C. & H. R. R. Co.*, 50 (N. Y.) 176, in re Flushing Ave., 101 N. Y. 678, *Whipple* v. *Williams*, 4 How. Pr. (N. Y.) 28.

[3] Approximately 40 per cent, as I understand.

of the assimilation. And when I have asked why, I have always had the same answer: We cannot trust the judges with such vast power without the right of review!

And so the existence of such a meticulous and detailed legislative law of mere method begets a distrust of the very judiciary itself, and thus has sprung up a vast body of interlocutory litigation, expensive and tedious, to discover not which of the parties has the stronger right, but whether the umpire proceeded according to the rules of the game!

Personally I have no hesitation in declaring that the public interests *demand* the immediate abolition of all interlocutory appeals, except in cases granting or refusing injunctions, attachments of property, or arrest of persons, where the postponement of the appeal would or might work serious injury.

And this prompts me to formulate the ideal of litigation from the standpoint of the litigant: one trial upon the merits after adequate opportunity for preparation, speedy, just in its methods, inexpensive, in a court of unlimited powers to administer the whole law of the land applicable to the dispute; and one appeal for the *correction* of substantial errors, and not merely for the *discovery* of such errors.

CONCILIATION

There is, however, to my mind an additional public ideal which can be realized through a court properly organized and conducted. It is to the public interest not only that there should be an end of dispute, but also that no dispute should be submitted to the ordeal of a real trial unless it is of such nature as really to merit it. I am advised that in Scandinavian countries, attempt at conciliation is a necessary preliminary to trial, and that in consequence the cases reported for trial do not exceed 10 per cent of the suits brought. I have no personal knowledge of the procedure nor of the statistics.

The Constitution of 1846 in New York provided for the institution of a Court of Conciliation,[4] but the time did not seem to have been ripe and it became a dead letter, to be eliminated in 1894.[5]

I do not see but that the time of one or more judges or masters might be profitably employed in sifting the true merits of all litiga-

[4] New York Constitution 1846, Art. VI, s. 23. See Report New York State Bar Association for 1916, Vol. XXXIX, pp. 304, 305.

[5] Cf. New York Constitution 1894, Art. VI.

tions in the presence of the parties, with or without their legal counsel, explaining to them the law as applied to the matters in dispute, not advising a compromise, but predicting the probable legal outcome upon the merits as they appear, without prejudice upon the actual trial, if any ensues.

THE CONTINGENT FEE

The allowance of speculation in litigation by lawyers, for a share of the recovery, has greatly aided in the increase of unmeritorious litigation and the consequent imposition of expense in the maintenance of courts. The interposition of some interlocutory inquiry into the reasons for the institution of the suit, whether and to what extent solicited or promoted by the lawyer interested in a contingent fee, and some justification on the ground of inability or otherwise, for permitting a contingent fee or fee for a share of the recovery, similar to the inquiry for permission to prosecute *in forma pauperis* would tend to confine such litigation within the limits of the ground upon which such contingent fees are always justified,—in argument,—the poverty of the litigant. The truth is that the public interests are too little supervised to discourage the volume of unmeritorious litigation. The report well indicates, by its quotations in respect to the English practice, how unmeritorious litigation is there sifted out at early stages.

DEFECTIVE LAWS OF EVIDENCE AND THE CIVIL JURY

I would be untrue to my own convictions if I should omit to mention the part which unreasonable laws of evidence and an unreasoning and superstitious attachment to the civil jury play in defeating the true ends of justice in litigation.

The devotion of our judiciary to the principle *stare decisis* has engrafted upon our law the perpetuation of judicial error, unless corrected by the legislature. The consequent consideration of precedent as establishing law has made the ascertainment of law at any given moment the process of impressing upon the judicial mind, in any controversy, a composite photograph of all previous judicial decisions "from whatever source derived." It may not be very difficult to grasp and apply a fundamental judicial concept, but when its application is to be derived not from its obvious relation to the particular dispute, but by reference to the application of

every aspect and modification of it, to every known state of facts which the industry of every reporter has been able to cull from all known sources, then the resultant is too apt to present about as much resemblance to the true type, as the composite photograph does to any individual of the group of which it is composed.

THE LAW OF EVIDENCE

Our law of evidence is almost wholly of judicial origin. With a few exceptions—disastrous, it is true, in their results—the judicial mind has had freer constructive play in elaborating and engrafting the law of evidence than in any other field of constructive judicial activity. As a result the treatises upon the law of evidence are among the most numerous and voluminous to be found in our law libraries, and the results are the most unsatisfactory in their uncertainty, as well as in the particular pointed out in the report, that they offend the intellectual sensibilities of the average intelligent man who properly thinks that the rules exclude much that makes for the ascertainment of substantial truth.

The judicial concept that no man could properly be heard to testify in a dispute in whose result he was interested, became engrafted on our law through the rule *stare decisis;* it became so much a part of the law that it required legislative interference to correct it and it still so far lingers that the superstition still prevails that public good can be achieved by excluding all evidence of the transactions of an interested party with a deceased person, even when the evidence consists of writings in the undisputable handwriting of the decedent coming from the custody of the person whose mouth is shut. Legislative interference, as judicially construed, with the common sense rules of the common law, in extending unreasonably the privilege of communications with an attorney and his employes, and in creating privilege for communication to a physician, trained nurse and the like,[6] has led to obvious absurdities having no foundation in basic reason, but being grounded merely upon debatable judicial constructions.

Upon every occasion when such absurd and unintended result follows upon a debatable judicial determination at least of a court of last resort, it becomes a part of the law of the land essentially incapable of change, except by additional and possibly abortive legislation.

[6] New York Code of Civil Procedure, ss. 835–836.

These statutory rules of privilege[7] are, as extended by the legislature, grounded in sentimentality, deliberately framed to prevent the ascertainment of truth from these sources. As judicially construed, they extend the legislative intent beyond what, it can be fairly argued, was the limit of that intent; and it shuts the door to the ascertainment of the actual truth. In practice it has produced some of the most absurd results; such for instance as that while a physician must publicly certify the cause of his patient's death before the issuance of a burial certificate is permitted, yet he will not be heard to testify to the same already disclosed fact in a court of justice, nor can his certificate, filed pursuant to law in a public office, be used as proof of the fact.[8]

A like absurdity is illustrated by the anomaly that a physician, who with the consent of his patient had publicly exhibited him and lectured upon his ailment and had published a descriptive article about it, was not permitted to testify to the same publicly heralded conditions in a law suit.[9]

When such situations come to light, they are unjustifiable absurdities to any candid citizen, whether he be layman or lawyer. And when one picks up such a book as Wigmore's *Manual of the Law of Evidence*, and sees page after page containing bracketed matter indicative of what the logical law ought to be, but is not, with occasional references to the "New York quibble" or the "Massachusetts quibble,"[10] he must be impressed as a good citizen that there remains much to be done by intelligent lawyers to bring the machinery of courts into efficient functioning to produce just results.

THE CIVIL JURY

I have spoken of the civil jury. I shall content myself with the statement of my personal conviction that no more persistent barrier to the achievement of a just result could be conceived by a malignant enemy of mankind, than the civil jury system as administered in

[7] New York Code of Civil Procedure, ss. 833, 834, 835, 836.

[8] See discussion—Witthaus and Becker's *Medical Jurisprudence, Forensic Medicine and Toxicology*, 2nd Ed., 1906, Vol. I, pp. 106, 141, 169, 170, 125 *et seq.*; *Buffalo L. and T. Co.* v. *Masonic Mutual Aid Assn.*, 126 N. Y. 450; *Robinson* v. *Supr. Com.*, 38 Misc. (N. Y.) 97: 77 App. Div. N. Y. 215. *Davis* v. *Supr. Lodge*, 165 N. Y. 159; *Beglin* v. *Metr. L. Ins. Co.*, 173 N. Y. 374.

[9] *Scher* v. *Metr. St. Ry. Co.*, 71 Ap. Div. (N. Y.) 28.

[10] *E. g.* Wigmore, *Manual of Evidence*, s. 1434, p. 325.

practice. We hamper it as a popular tribunal by limiting the evidence which it may consider, and by instructing it unintelligibly concerning the law which it is to apply. Then we let its uneducated prejudices produce the results, and point to them with superstitious pride, while we erect alongside of it, another system, that of equity, in which the worshipped jury plays no calculable part. Yet with a straight face, and with a legal mind apparently all unconscious of inconsistencies, we praise both systems as having an equal claim to our admiration.

A CHALLENGE TO LAWYERS

I have thus generalized because of my conviction that the legal mind itself needs working up to a challenge of the efficiency of the system which as a body it is content to administer. And also to urge that, if not a duty, it is at least a civic opportunity which confronts the legal profession, to measure the entire system by its results, not with a view to destruction, but with the opposite purpose of construction, so that the glaring inadequacies of the existing system may be rectified through the advice of those who, from experience and education, are best qualified to apprehend and effect.

These thoughts, however, have only a suggestive relation to the immediate question now in hand, which is the proposed model judiciary article for a state Constitution recommended for New York State by the Committee of the Phi Delta Phi, but typical in its nature of any ideal judiciary article.

THE PROPOSED JUDICIARY ARTICLE

When analyzed, I find that the proposed article contemplates in substance the lodgment of the entire judicial power of the state with two specific exceptions, political impeachments and justices of the peace, in a single judicial establishment with elasticity of branches, both for trials and appeals, with an elective chief justice who shall have a supervised power to fill judicial vacancies, such judiciary to be self-disciplining, as well as subject to impeachment, and with ample powers within itself for all proper administrative machinery and with power to designate masters and delegate to them certain inferior judicial duties, to admit to the bar and to designate a disciplinary body for supervision of bench and bar.

The simplicity of this statement seems to me to be captivating;

the proposed unified court appears in substance to be sufficiently comprehensive in its organization; its method of selection seems to me to be justified by the argument in the report; and every proposition advanced in the report in respect to the article seems to me substantially sound. A scrutiny of the respective articles and the committee's arguments or explanations, suggests, however, the following additional observations.

AN IDEAL JUDICIARY ARTICLE

A constitution in its judiciary article should not be an inflexible mold, into which the judiciary of the state is poured once for all, but it should contain in its own provisions, recognition of the fact that the state itself should be expected to grow, and that the necessities and ideals of the people can be expected to change, and it should not require a change of the Constitution to equip the judiciary to meet changing needs. The constitution should not be like the crab shell or the snake skin which must be completely cast to meet the necessities of the living organism which it protects and shelters, but it should rather be like the human integument which unconsciously expands from day to day with the natural growth of the individual whose outward measure it is. Or, if we compare it to a mechanical device, it should be like a ratchet wheel which secures against retrogression, but is ever ready to be released to admit of progress. For this reason it should never be too rigid in its requirements. The proposed article seems admirably framed to meet this suggestion.

THE JUDICIAL POWER

"The judicial power," with two exceptions,[11] is to be lodged in the court. This is, in my opinion, a proper definition of the jurisdiction of such a court. It has been the practice heretofore to limit the jurisdiction by reference to the courts of common law and equity in England. The present Supreme Court of New York has by the Constitution general jurisdiction in law and equity,[12] as though that exhausted the exercise of the judicial power. But it does not. There was a large judicial power in England, recognized at common law, but vested in administration in the ecclesiastical courts; not

[11] Sec. 1.

[12] Art. V, s. 1.

to speak of the jurisdiction in admiralty, and prize jurisdiction, which is probably not within the present sovereign power of the state. In the early days of New York under the decision of Chancellor Kent, in *Wightman* v. *Wightman*,[13] certain ecclesiastical jurisdiction was said of necessity in a civilized community to have devolved upon the Court of Chancery in New York, though not exercised by the Court of Chancery in England. Upon that decision, a doctrine has been widely adopted in this country, that such jurisdiction necessarily devolved upon American courts exercising chancery jurisdiction.[14] Of late, however, the tendency has developed in New York courts to deny Chancellor Kent's contention[15] so that the anomaly is presented, through the arguments or dicta of these later decisions, of a judicial power in abeyance because it is neither law nor equity. The jurisdiction, instead of being found in the lodgment of judicial power, is sought through the legislative creation of judiciable controversies arising out of defined states of facts. In other words, and for example, instead of the Supreme Court as a Court of Equity having inherent jurisdiction to pronounce by judicial decree, operative upon the parties and all claiming under them, a marriage invalid which was void in its inception for whatever cause (a jurisdiction exercised by the ecclesiastical courts in England) that jurisdiction is held to be in abeyance in New York, except in those specific cases in which the legislature has by general law conferred the right to litigate upon the parties. It is far more reasonable to lodge "the judicial power" of a state in a court, than to limit its exercise to those cases which in England were cognizable in the courts of law or equity. In England the jurisdiction of equity was capable of growth and enlargement in harmony with the fundamental principles of equity and jurisprudence. Prior to April 19, 1775,[16] many notable instances of the deliberate extension of such

[13] 4 Johnson, Ch. R. 343.

[14] Stewart, *Marriage and Divorce*, ss. 139, 140; *Perry* v. *Perry*, 2 Paige Ch. (N. Y.) 504; Anonymous 24 N. J. Eq. 19; *Selah* v. *Selah*, 23 N. J. Eq. 185; *Hawkins* v. *Hawkins*, 38 So. Rep. 640 (Ala.); *Norman* v. *Norman*, 54 Pac. R. 143 (Cal.); *McClurg* v. *Terry*, 21 N. J. Eq. 225; *Waymire* v. *Jetmore*, 22 Ohio St. 271; *Powell* v. *Powell*, 18 Kan. 371; *Johnson* v. *Kincade*, 37 N. C. 470; *Clark* v. *Field*, 13 Vt. 26 Cyc. 900.

[15] *Davidson* v. *Ream*, N. Y. App. Div. 3rd Dept., May, 1917; *Stokes* v. *Stokes*, 198 N. Y. 301; *Walter* v. *Walter*, 217 N. Y. 439.

[16] See New York Constitution, Art. I, s. 16, fixing this date as the date upon which the common law of the Colony of New York crystallizes.

jurisdiction are to be found, even in situations in which in order to assume the jurisdiction it became necessary to overrule the views of a prior chancellor.[17]

But where the jurisdiction of a court of general powers is constitutionally defined as "general jurisdiction in law and equity," the judicial interpretation of such definition is altogether too apt to be limited to rigid conformity with the jurisdiction of the High Court of Chancery as historically assumed on April 19, 1775. This has been the case with the subsequent treatment in New York of the great principle of equity jurisdiction announced by Chancellor Kent in the leading case of *Wightman* v. *Wightman*. The Chancellor there argued that it is essential to the best interests of a civilized community that during the life of two persons apparently married, some court should be inherently vested with the power to adjudicate their relation to each other, not as an incidental or merely collateral matter, which only affects the parties to the specific suit—such as a suit at law against the putative husband, by a third person, for his alleged wife's necessaries—but in a plenary suit between the alleged spouses to decree what their status really is, whether married or unmarried. The Chancellor, while recognizing that Courts of Equity had not exercised this power in England because it was vested in the ecclesiastical courts, nevertheless concluded that as there were no ecclesiastical courts in New York, the jurisdiction devolved upon the judicial establishment as a necessary incident of civilized society, and that the fundamental constitution of the Court of Chancery was such that it could best exercise the jurisdiction. Hence the court had such jurisdiction and he as Chancellor should assume it. This view was followed by Chancellor Walworth in *Perry* v. *Perry*.[18]

But since that date, although, as I have already stated, this determination properly stands as the foundation stone in a well recognized branch of equity jurisdiction in several states,[19] the New York courts, bound by the concept of "*equity* jurisdiction," have repeatedly denied the great principle recognized by Chancellor Kent and Chancellor Walworth, and have explained that the specific cases in which they acted had peculiar features, such as lunacy,

[17] See "The Enforcement of Decrees in Equity," Huston, *Harvard Studies in Jurisprudence* 1, Chap. V, VI.

[18] Paige Ch. (N. Y.) 504.

[19] *Supra*, p. 117.

infancy, fraud or duress, which were themselves sufficient justification for the exercise of an inherited equity jurisdiction, without recourse to the great general principle, that in any case, where the validity of a marriage was in doubt it was an inherent part of equity jurisdiction that either of the putative spouses could bring a bill against the other to determine their status in relation to each other.[20]

It has crippled the efficiency of the judicial system established by the present constitution for the courts themselves to have so construed the grant or definition of jurisdiction of the Supreme Court (continued as a court of general jurisdiction in law and equity)[21] as to limit its jurisdiction in equity to those particular instances in which it can be demonstrated by reference to actual precedents that prior to April 19, 1775, the Court of Chancery in England granted relief. This has the effect of pouring the court into a mold of the precise limits of 1775 without giving it an opportunity to grow with the judicial needs of the people, save in so far perhaps as the legislature may in specific cases—as it has done in certain classes of matrimonial actions—grant rights of action, which can then be administered in a court. This result, recognized by the courts, as growing from a legislative act, presents the illogical anomaly of a judicial power arising from legislative action, instead of a judicial power inherent in a constitutional grant.

The same rigid concept was unfortunately written into the Constitution of the United States[22] so that, by reason of the early, perhaps unnecessary, judicial concept of the effect of the use of the words law and equity,[23] it seems to have become eternally impossible in the federal courts to adopt the approved modern practice of administering all the law of the land applicable to a given state of facts, in the same suit, whether by the practice of England in 1776 it was cognizable and administrable partly at law and partly in equity. Only recently have our national legislators, after nearly one hundred and forty years of national life, seemed to discover that it is not impossible, within the Constitution, to make the practice

[20] *E.g.* see language of Sanford Chancellor in *Ferlat* v. *Gojon*, 1 Hopk., 541; *Burtis* v. *Burtis*, 1 Hopk., 557.

[21] New York Constitution 1894, Art. VI, s. 1.

[22] United States Constitution, Art. III, s. 2.

[23] *United States* v. *Howland*, 4 Wheat (U. S.) 108, 115.

more flexible, in spite of the unfortunate reference to law and equity as rigid systems, in the Constitution.[24]

It is therefore highly desirable that in a typical constitution we should abandon references to "law and equity" as defining the jurisdiction of courts, and lodge the *judicial power* in the judicial establishment, with such exceptions, if any, as may be deemed wise. A judicial power, not exercisable by the judicial establishment, is an unjustifiable anomaly.

JUDICIAL POWER OF EXECUTIVE AND ADMINISTRATIVE AGENCIES

There is another reservation, which perhaps should be inserted in section 1, so as not to embarrass either legislative or executive branches in the proper performance of their duties. It might be successfully contended that section 1 lodges the whole judicial power in the judicial establishment, and therefore that no judicial power can be lodged or exercised elsewhere. What is the power now exercised by boards of tax assessors in reviewing assessments to ascertain over-valuation and inequalities? What is the power exercised by condemnation commissioners in appraising values and assessing benefits for public improvements? What is the power exercised by workingmen's compensation commissioners in ascertaining facts upon which to award compensation?

In a recent very exhaustive opinion of a deputy attorney general of the state of New York it has been made to appear that he considers by reason of many decisions of the courts themselves, that in so acting the board of assessors is a "judicial body."[25] If so, is it exercising "judicial power?" It must be that a judicial body exercises judicial power in performing the duty which makes it a judicial body. But if so, then the present proposed section 1 would make it impossible for the legislature to give a board of tax assessors power to correct its previous erroneous assessments upon an investigation conducted by the taking of evidence. If the taking of evidence to reach an authorized result constitutes the investigating officers a judicial body, as seems to be the burden of the decisions

[24] U. S. Judicial Code, ss. 274 a, 274 b, as added by Act of Congress, March 3, 1915, ch. 90; see Federal Equity Rules XXII and XXIII, promulgated November 4, 1912.

[25] Opinion of Deputy Attorney General Smith in matter of L. Tanenbaum, Strauss & Co., Inc., 1917.

upon which the deputy attorney general bases his view that a board of tax assessors is a judicial body, then it seems that to avoid an embarrassing curtailment of the powers of administrative functionaries, section 1 should have a saving clause, substantially as follows:

"But executive or administrative officers or functionaries may be vested by law with such judicial power as shall be necessary for the proper performance of their prescribed duties."

It is, I believe, well recognized that an absolute separation, along rigid lines, of the executive and judicial branches of government, is a practical impossibility. In the performance of executive or administrative duties, the methods of judicial procedure and certain characteristic judicial safeguards often become a prime necessity to proper action. When such methods are introduced by law, it frequently happens that these functionaries are said to act quasi-judicially. If the propriety of their acts or conclusions is to rest, as frequently it should, upon the observance of judicial standards,—such for instance, as that the evidence upon which their conclusion rests, if required to be taken under oath, must justify the conclusion,—and especially if it is subject to review, the standard itself is judicially determined upon such review, by considering that it must meet ordinarily accepted judicial requirements,—for example, that there must be some credible evidence to sustain the conclusion and justify the act. And to explain the applicability of such standards, the courts resort to the proposition that such functionary acts quasi-judicially. Hence it must accept judicial standards. It is not long before the word "quasi" is dropped in some carelessly written opinion, and then we have it judicially established, by words, at least, that the body, administrative in its origin, is a judicial body or proceeds judicially. And, if by a new Constitution, the whole judicial power is lodged in a court or courts, it will at least avoid the embarrassment incident to a reformation of concepts embraced in hasty or ill-considered judicial opinion, if we save to the legislature expressly, the right to empower such executive or administrative bodies or functionaries to proceed judicially in the performance of their duties.

THE PEOPLE OF THE STATE AS A PARTY LITIGANT

The provision in the proposed section 1 for suits by and against the People of the State is a laudable one. The People in their cor-

porate capacity should be willing to do justice, or at least to have justice ascertained in respect to their rights and duties. One of the oft-recurring political scandals arises in New York State out of the necessity of resorting to a separate tribunal to establish the validity of claims against the state. The idea that the sovereign cannot be sued without his own consent in his own courts grows out of a historical fact that we can well overlook as inconsistent with the spirit of our institutions, by giving the consent once for all in the Constitution, instead of letting the legislature fool with it continually by defining from time to time, as it suits temporary expediency or party views, the causes of action for which claims may be presented against the state and the tribunals before which they may be brought. It is a well-known fact of recent history, that this tribunal has been the football of politics, existing first as a "Court of Claims," but not judicially recognized as a court, and then as a "Board of Claims"[26] reconstituted in order to vote the incumbents out of office and institute their successors. It is also well recognized that this body with limited human powers is so congested that, it is said, its calendar of current business, without any additions, would take twenty years for its disposal.[27] This, of course, is a practical denial of justice amounting to sovereign dishonesty. Such is the proverbial injustice of sovereign states, that it called not long since for an able paper before the New York State Bar Association under the title "The Dishonesty of Sovereignties," with numerous illustrative examples to justify the title.[28]

Why should not the People of the State be as amenable to judicial control,—to the extent at least, of judicially determining their duty,—as the citizens of the state? One of the greatest hardships that can be imposed upon a citizen or property owner, is to find that the state has by devolution or otherwise acquired a junior lien or some doubtful claim, and that he cannot remove it or procure its satisfaction, either by disputing it or paying it off. Yet such is not an infrequent result of the doctrine that the sovereign cannot be sued in its own courts without its consent. Repeated attention has been

[26] See *Smith* v. *State of New York*, 214 N. Y. 140; and Remarks of Ex-judge Cullen, Report New York State Bar Association, 1915, Vol. XXXVIII, p. 721.

[27] Report New York State Bar Association, 1915, Vol. XXXVIII, p. 57; 1913, Vol. XXXVI, p. 391.

[28] Report New York State Bar Association, Vol. XXXIII, 1910, p. 229.

called both in the American Bar Association and the New York State Bar Association [29] to the intolerable hardship of this situation, illustrated by actual instances. A state should give its own consent to have its just rights and its just duties, as property owner or as wrongdoer, adjudicated according to established principles of justice as ascertained and administered in its courts. No fear need be entertained under the proposed constitution that improvident executions will be issued against the state. Section 9, which relates to certifications to the legislature, still implies the necessity of legislative action for the payment of money judgments against the People of the State.

THE ABOLITION OF EXISTING COURTS

Section 2 of the proposed Constitution requires no comment from me, save to call attention to the phrase "All of their jurisdiction should thereupon be vested in the Court of the State of New York." This might imply that the word "should" as contrasted with the word "shall" in the following clause, connotes a merely advisory meaning. It seems to me that "shall" is the proper word in each clause.

APPEALS

Section 3 providing for division of the court, contemplates a division of intermediate appeal and a division of final appeal. That is a perpetuation of the present practice adopted merely to relieve congestion in the Court of Final Appeal. I have already stated that, in my view, the ideal system contemplates one trial and one review within the reach of every litigant for the *correction* and not the mere *discovery* of error. If any other arrangement is made it should arise from practical necessity and not through the application of any theory of the rights of litigants. I doubt whether fixing the number of divisions, if any, of intermediate appeal should not be regarded as a part of the administrative business of the court to be determined by the Convention of the Judges or by the Board of Assignment and Control. I see no advantage in a *constitutional* division of intermediate appeal. There will always be a disposition on the part of litigants to consider that they have not had justice, if the Court of Final Appeal is closed to them. It appears to me that if the judges

[29] See Reports of Committee on Government Liens on Real Estate, American Bar Association Reports 1915, p. 531; 1914, p. 626.

of the Division of Final Appeal sat in divisions with the possibility of the reservation or review, according to rule of court, of matters of sufficient public importance to require the consideration of a majority of the entire division, it would result in a more harmonious administration of justice and a greater certainty of law than any system based primarily upon an initial appeal to an intermediate division of different personnel.

The jurisdiction of our Court of Appeals has been recently limited by legislation so as to exclude an appeal as matter of right, where the judgment of the intermediate appellate division, not involving an interpretation of state or federal constitution, is a unanimous judgment of affirmance.[30]

In the discussion of the advisability of this legislation, my attention was directed to a series of decisions of the Court of Appeals construing our transfer tax law, from which it appeared that, for several years, substantially every case of reversal of the appellate division upon this subject has been a reversal of a unanimous decision, while substantially every case of affirmance upon this subject has been the affirmance of a decision from which there was a dissent in the appellate division; so that my informant who had collected the statistics, facetiously stated that if a man wanted to secure a reversal by the Court of Appeals he must be careful to get a unanimous contrary decision below, for, if there was a dissent below, the chances were 100 per cent in favor of the majority being right, whereas if they were unanimous, the chance of their being wrong was 100 per cent.

What can be the possible advantage of closing the Court of Final Appeal to unanimous decisions of the intermediate court, in the face of such illustrations? Is it not more likely that the same cast of thought and adherence to the permanent judicial traditions, making for greater certainty of law, would arise from a final court sitting in divisions, with a right to sit in banc under rules, than a constitutionally enforced separation into two divisions, one superior, the other inferior, and of different personnel? Where there is but a single court, I can see no objection to abolishing the intermediate divisions of Appeal and having the final division sit in divisional parts, with reservations to the full bench of the final division, a majority to constitute a quorum. Both in Massachusetts and New Hampshire I have been a participant in causes where the question of law was

[30] New York Laws, 1917, c. 290.

reserved by the trial judge for the full bench, thus avoiding the necessity of a duplication of argument upon important questions of law, and suspending final judgment until the opinion of the final court had been pronounced. This economized labor of court and counsel and greatly facilitated the progress of the litigation. If the court were constitutionally free to follow this course, it could be provided by rule, and the court could adopt from time to time such course as should seem appropriate, without the rigid inflexibility contemplated by the proposed section. It has been found possible in many administrative bodies, such as the Interstate Commerce Commission and the Federal Trade Commission, to apportion the work so as to avoid the formation of distinct divisions and without impairing the efficiency of the entire body as a working whole. It seems to me that a similar apportionment might be made by the court to avoid intermediate appeals, as a wasteful expedient.

FLEXIBILITY A MEASURE OF CIVILIZATION

Flexibility of procedure really measures the distance of a people from barbarism, if not from savagery. All early idea of both law and procedure is rigid in its formalism. Rights themselves, supported by law, must fall within limited and simplified categories, and remedies must be pursued in specified formulae; that is a substantial progress out of juristic chaos, but it does not mark a high state of civilization, at least it marks a crude stage in judicial evolution. We have now progressed through equity toward the abolition of the formalism of legal concept, but equity itself has become formal, and again rights and remedies fall into established categories—"heads of equity jurisdiction." We have also advanced in some states beyond the common law forms of action, and assumpsit and debt and case, and trover and trespass have in certain jurisdictions disappeared as separate forms of action, but as a profession we still stick to the distinction between law and equity, and judicial minds will preserve the distinction, notwithstanding determined effort to abolish it in the administration of law. So we have persistent judicial effort, aided and directed by professional advocacy, which preserves in practice what has been abolished in theory; or which introduces the rigidity of law into the administration of equity, instead, as intended, of liberalizing legal procedure to accord with equitable concepts. It seems to me that this same disposition, in a

different aspect, is manifest in the constitutional effort to perpetuate an intermediate Court of Appeal, once established and in operation, instead of leaving that to be one of the flexible incidents of an evolution from necessity.

REVIEW OF INTERLOCUTORY ORDERS

Personally, I do not feel that I can too strongly urge that a large part of the necessity for an intermediate appeal would permanently disappear if it were recognized in state, as in federal practice, that an appeal from interlocutory orders, with certain narrow exceptions, is not a right and should not be accorded.

JUDICIAL DEPARTMENTS

Section 4 seems also to be open to the same sort of criticism as section 3. Why should the Constitution create judicial departments? Why should not that likewise be considered a part of the administrative business of the court, to be dictated by its experience of local convenience and necessity?

THE APPOINTING POWER

Section 5 seems to invite the inquiry why the governor should exercise any appointing power whatsoever; and whether it would not be more consistent with the fundamental justification for the election of a chief justice, that his selection should always rest with the electorate, that his duties in case of death or retirement be performed by a *locum tenens* designated from the other judges by the remaining members of the Board of Assignment and Control, and that the vacancy be filled at the next general election, occurring at least six weeks after the vacancy, or at a special election, if deemed proper, to be called for the purpose?

Why should not the chief justice, if elected to make an appointment, have the power of appointment, instead of the mere power of nomination for confirmation by the Board of Assignment and Control? In New Jersey the Chancellor's appointments of Vice Chancellors has proved a great success, and no body of men command greater respect than the appointees of the Chancellor.

JUDICIAL PENSIONS

The pensioning of a retired judge seems a desirable innovation; it is consonant with a practice largely prevailing. The present

Constitution[31] forbids them to serve as judges after their seventieth year and fixes their compensation, and yet it is evaded, by authority of statute, by the device of selecting them as official referees.[32] While it is true that they render valuable service as official referees, their designation for that purpose, primarily as a justified pension for acceptable judicial work, is contrary to the fundamental theory of their forcible retirement from the judicial office.

There is small necessity for further comment upon the later sections of the proposed article. The principle of the previous sections being accepted the later sections naturally follow, in the main, as a harmonious part of the scheme. The innovations are sufficiently explained and advocated in the report.

THE POWER OF REMOVAL

Section 7 leaves it doubtful, perhaps, whether in case of removal of a justice the board is concluded by the certificate of the Board of Assignment and Control and must act ministerially. It would seem well to definitely settle this point in the section itself.

MASTERS

The present system of distributing judicial patronage through the designation of referees to particular litigants is liable to serious abuses, continually manifested in practice, the chief of which are the designation of men incompetent for the service and the unjustifiable increase of the cost of litigation. The per diem fixed by law, $10 a day,[33] is notoriously inadequate; and the permission to agree upon a different fee has led in practice and experience to serious abuses, sometimes operating unjustly against the referee, at other times, and more frequently, to the disadvantage of a litigant. It is so liable to such abuses as to be one of the chief objections to the present method of administering justice. Every argument in favor of referees applies more forcefully to standing, salaried masters, and every substantial objection to referees is avoided by such office of master. The fee system is always liable to abuse. It has been abandoned in many cases, but it survives in some of its most objectionable features in a system of refereeships, distributed as

[31] New York Constitution, Art. VI, s. 12.

[32] New York Judiciary Law, ss. 115, 116.

[33] New York Code Civil Procedure, s. 3296.

judicial patronage, with an indeterminate charge paid by one of the disputants to the virtual judge. It creates, if it does not justify, the suspicion and the complaint, that the referee's pecuniary interest too often dictates his decision. He should be removed from the temptation, as well as from the suspicion.

If the argument in favor of an elective chief justice is to be given its full weight, it does not seem apparent why his designation of masters should be subject to confirmation by the board. If the appointing power is to be vested in him, it would seem that it ought to be untrammeled, save by the right of removal for unfitness.

As masters are to be designated by the judicial department, it seems inconsistent for section 8 to provide for the salaries to be fixed by local fiscal municipal boards in the several counties. It would seem that county boards should not have control unless their salaries are a county charge, and that these should not be a county charge unless the authority is a local authority and their district a county.

The economy and advantage of a properly administered system of masters is apparent. It is not only justified by the success of the plan in England, but it commends itself in practice through the satisfactory operation of the system of referees under the federal bankruptcy act.

JUDICIAL ADMINISTRATION

Section 9 is in the main self explanatory, and in the new system it is probably the most important section. Its provision in respect to *rules of evidence* is, in my opinion, a very praiseworthy one, though a great innovation. It is the chief fault of our judge-made law of evidence, that a judge-made rule, no matter how harsh or unsatisfactory it may prove in practice, remains the law of the land. Many of our judge-made rules are the subject of serious criticism; notably the rule peculiar to New York State, and characterized[34] by Wigmore as "the New York quibble," that a lay witness, testifying to the acts and conduct of a person in a controversy over his mental competency, is limited to expressing his opinion in respect to the impression made upon him by such acts and conduct, to the single view whether they seemed rational or irrational; whereas there is no real reason why such person should not be permitted to charac-

[34] Wigmore, *Manual of Evidence*, p. 325, s. 1434.

terize such impression, even to the extent that he thought the person was crazy or that he was competent or incompetent to do the act in question. A board of such control could modernize the rules of evidence by prescribing particular rules so as to mitigate the absurdities in our faulty precedents inconsistent with the trend elsewhere. Wigmore's *Manual*, as I have already said, contains countless illustrations of specific decisions which have fixed the law in a particular state at variance with the same law in general elsewhere, though both were supposed to be merely intelligent methods for ascertaining truth and not ends in themselves.

DISCIPLINE OF BENCH AND BAR

The Committee on Discipline advocated by section 10, is likewise a desirable innovation. A judge, as well as a member of the bar, should be subject to the discipline of his own institution. Impeachment is a most drastic method of punishment; it almost always is administered politically and for partisan reasons, either for offense or defense; it is never used to correct minor errors, consequently there are numerous small abuses arising from judicial administration which are not subject to correction. Judicial delay or neglect or petty abuse of privileges, or offensive conduct toward lawyers, litigants or witnesses, antiquated or wasteful methods, all go entirely uncorrected, merely because there is no avenue through which correction may be achieved. The judicial establishment should have machinery for rectifying its own abuses.

Also the Board of Discipline should administer the courts' power of supervision of the *bar*. This power in New York State is now systematically administered through the voluntary but very expensive activities of certain bar associations, which impoverish themselves in an effort to keep the bar at a high level of decency. It should be a state charge.

The laxity and indifference of courts in tolerating abuses by the bar, has been the subject of bitter and widespread criticism; it is one of the most thoroughly justified complaints against judicial administration. The officers of the National Credit Men's Association have within two years made it the subject of a special appeal to the American Bar Association and to the state and local bar associations.[35] The courts of New York have for several years past been

[35] See Report American Bar Association, 1916, Vol. XLI, p. 455.

alive to the necessity[36] and have administered appropriate discipline to an extent unequalled elsewhere. Nevertheless, the burden of investigation has been undertaken by bar associations at great expense; and if it were not for the voluntary activities of the association the work would remain undone. This method necessitates a double investigation of the same facts, once the voluntary investigation undertaken by the Committee on Grievances of the Association, and then the formal investigation before an official referee, leading to unnecessary delay, duplication of expense, and the exhaustion of the patience of witnesses and complainants.

JUSTICES OF THE PEACE

Section 12 providing for justices of the peace commits what seems to me to be a grave error in Constitution drafting, in that it measures the jurisdiction of judicial institutions by undefined existing conditions. A Constitution should define the limitations which it imposes and not leave it to casual and perhaps faulty examination to determine the conditions which it prescribes as a measure. Such conditions always become more indefinite as they recede in point of time, and some of the greatest pitfalls of constitutional limitation are to be found in such indefinite reference.

JUDICIAL STATISTICS

The article (Sec. 13) contains a wise provision for the collation and publication of judicial statistics. An adequate knowledge of judicial administrative requirements must be dependent upon systematic judicial statistics. The statistics of England, and of some scattered courts in this country, such as the Municipal Court of Chicago, the City Magistrates' Court of New York City and the County Court of Alleghany County, Pennsylvania, are not only publicly instructive, but they reflect and in a large measure make possible the efficiency of those courts. The people have a right to know and they ought to know the relative activity of their courts; judicial statistics keep them apprised of efficiency and need. Only one who has studied such statistics can grasp the surprising light which they throw upon the judicial establishment in its relation to civic life, the increase of litigation with growth of population, the relation of

[36] "Disbarment in New York" by Charles A. Boston, New York State Bar Association Reports, Vol. XXXVI, p. 467.

litigation to periods of prosperity and financial depression, the relation of particular civic conditions to classes of litigation, the relative efficiency of different courts and judges, the necessity for more judges in particular places or for particular matters. All of them are quickly reflected and indicated by properly compiled judicial statistics. All of these factors are graphically illustrated in the English judicial statistics periodically compiled and published by the King's Remembrancer, and in the City of New York similar work is done under the auspices of the appellate division in the first department without the requirement of law, upon a plan devised by a committee of judges with the aid of qualified expert accountants as well as the clerks of the courts. A systematic rather than a sporadic collection and publication of judicial statistics would prove of value to both people and courts.

UNCONTESTED PROBATE MATTERS

The proof of uncontested wills and the issue of uncontested letters testamentary and letters of administration or guardianship are often regarded as an administrative and not as a judicial function. It is not inherently a judicial function any more than the recording of deeds duly acknowledged or the filing of chattel mortgages. It creates a *prima facie* right; in practice, even though done through a court, it is a ministerial labor. I should recommend some specific provision in the Constitution to preserve such uncontested matters as administrative functions of a local office readily accessible. But I am advised that the proposed article will not interfere with the establishment of such offices either under the auspices of the Masters or the inferior judiciary.

Finally, I commend to the favorable consideration of the readers whom *The Annals* will reach, the proposed Judiciary Article, to the end that the reformation in the direction of simplicity, flexibility, efficiency and economy, which it recommends, may be attained.